WHO'S GOT YOUR SIX? RAMIFICATIONS OF THE COURT'S REFUSAL TO DEFINE "INCIDENT TO SERVICE" IN THE *FERES* DOCTRINE ON MILITARY SEXUAL ASSAULT SURVIVORS

Chelsea M. Austin[*]

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INTRODUCTION

In the early morning of May 9, 2010, no one had Jane Doe's "six."[1] When someone "has your six," it means they have your back and will act in your best interest.[2] A fellow West Point cadet raped Doe while on a walk around campus after hours.[3] During the walk, the fellow cadet offered Doe a few sips of alcohol, which did not mix well with the sedative she took earlier in the evening.[4] The mixture caused Doe to lose consciousness, and it was at that point the fellow cadet raped her.[5] Doe sought care from the West Point health clinic the next day, and, although she reported being sexually assaulted by a friend, the clinic did not collect or preserve any forensic evidence from the assault.[6] Concerned with the possibility of a tarnished reputation, retaliation from her peers, and punishment for being out after hours, Doe decided to file a restricted report.[7] Doe later resigned from the military and was honorably discharged on August 13, 2010.[8] It was

1. *See* Doe v. Hagenbeck, 870 F.3d 36, 39 (2d Cir. 2017).

2. *See Who We Are*, GOT YOUR 6, https://gotyour6.org/about/who-we-are/ [https://perma.cc/ND28-56ER] (last visited Nov. 26, 2018) (explaining that the term originated from World War I fighter pilots and signifies the idea of loyalty and cooperation within the military).

3. *See Hagenbeck*, 870 F.3d at 39; *see also About West Point*, WEST POINT, https://www.usma.edu/About/SitePages/Home.aspx [https://perma.cc/HTJ3-L4DK] (last visited Nov. 26, 2018) (explaining the history of the military academy as a historic institute for United States Army training and education).

4. *See Hagenbeck*, 870 F.3d at 39. Doe was prescribed a sedative to help her sleep. *See id.*

5. *See id.* "Doe contends that Smith 'was aware that [she] had lost consciousness and took advantage,' attacking her and having 'forcible, non-consensual intercourse with her.'" *Id.*

6. *See id.* at 39. The clinic provided Doe with emergency contraception, tested her for sexually transmitted diseases, and informed her that she had signs of vaginal tearing. *See id.*

7. *See id.* at 40 ("It was common knowledge among the cadets that successful women in the military did not report incidents of sexual assault.").

8. *See id.*

not until April 26, 2013, that Doe filed a complaint in the United States District Court for the Southern District of New York.[9]

Doe pleaded four independent claims of action: (1) a *Bivens* claim[10] based on an alleged Fifth Amendment due process violation against her two superior officers, Lieutenant General Franklin Lee Hagenbeck and Brigadier General William E. Rapp;[11] (2) a *Bivens* claim premised on an alleged Fifth Amendment equal protection violation against the Lieutenant General and the Brigadier General; (3) a claim for breach of covenant of good faith and fair dealing under 28 U.S.C. § 1346(a)(2) against the United States;[12] and (4) a Federal Tort Claims Act (FTCA) claim against the United States alleging negligent supervision, negligent training, negligence, negligent infliction of emotional distress, and abuse of process.[13] Accordingly, the material issue arising from *Doe v. Hagenbeck* was whether a service member may bring a claim against the military for injuries sustained incident to his or her service.[14]

Sexual assault in the military is nothing new, with it first gaining public attention after the 1991 Tailhook Scandal.[15] The current

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9. *See id.* On September 4, 2013, Doe filed an amended complaint. *Id.*

10. *See id.* A *Bivens* action, generated from *Bivens v. Six Unknown Named Agents*, 456 F.2d 1339 (2d Cir. 1972), generally refers to actions for damages when there has been a violation of the United States Constitution by a federal officer acting under federal authority. *See Bivens Actions*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/Bivens_actions [https://perma.cc/K9RA-3SN9] (last visited Nov. 26, 2018).

11. *See Hagenbeck*, 870 F.3d at 39-40. Lieutenant General Hagenbeck was the Superintendent of West Point, and in that role he chaired the Sexual Assault Review Board, which oversees sexual assault prevention and response at West Point. *See id.* at 38. Brigadier General Rapp was Commandant of Cadets at West Point and oversaw the training and administration of the cadets. *See id.*

12. *See id.* at 40. The Little Tucker Act, passed in 1887, gives the district courts original jurisdiction, concurrent with the Court of Federal claims, of any civil claim or claim against the United States exceeding $10,000, founded either upon: the Constitution, an act of Congress, a regulation of an executive department, any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not grounded in tort. *See The Little Tucker Act*, LSU MED. & PUB. HEALTH L., https://biotech.law.lsu.edu/map/TheLittleTuckerAct.html [https://perma.cc/NB5L-VF7Q] (last visited Nov. 26, 2018).

13. *See Hagenbeck*, 870 F.3d at 40-41. The defendants filed a motion to dismiss, which the district court granted in part and denied in part, leaving only the *Bivens* claim alleging that the defendants violated Doe's equal protection rights. *See id.* at 38.

14. *See id.* at 42.

15. *See* Stephanie Russell-Kraft, *'Continuum of Harm': The Military Has Been Fighting Sexual Assault in Its Ranks for Decades, but Women Say It's Still Happening*, TASK & PURPOSE (Feb. 7, 2018), https://taskandpurpose.com/military-sexual-assault-me-too/ [https://perma.cc/K9PT-VJM9] (explaining that the modern era of sexual assault awareness in the military started with Tailhook).

Department of Defense (DOD) policy defines sexual assault as intentional sexual contact that covers a broad range of categories such as rape, sexual assault, forcible sodomy, and the attempt of each of these actions.[16] While reporting procedures have seen improvements, survivors[17] of sexual assault have seen little recourse within the military justice system.[18] In the civil courts, justice is severely hindered due, in part, to the *Feres* Doctrine's limit on active military service members' ability to bring claims against their perpetrators in civil court.[19] In *Feres v. United States*, the Supreme Court held that the government is not liable for injuries to service members that arise out of activities incident to their service.[20]

Recent scholarship on the *Feres* Doctrine studies its effect on justice for military sexual assault and how the Doctrine has evolved through case law.[21] This Note analyzes the gap between the need for the *Feres* Doctrine[22] and the need for a clear definition of what constitutes the "incident to service" standard.[23] The Supreme Court has

16. *See* U.S. DEP'T OF DEF., ANNUAL REPORT ON SEXUAL ASSAULT IN THE MILITARY: FISCAL YEAR 2016, 6 (2016), http://www.sapr.mil/public/docs/reports/FY16_Annual/FY16_SAPRO_Annual_Report.pdf [https://perma.cc/KZ33-8838]. "In this report, DOD uses the term 'sexual assault' to refer to a range of crimes, including rape, sexual assault, forcible sodomy, aggravated sexual assault, aggravated sexual contact, abusive sexual contact, and attempts to commit these offenses, as defined by the Uniform Code of Military Justice (UCMJ)." *Id.*

17. *See* Gwendolyn Wu, *'Survivor' Versus 'Victim': Why Choosing Your Words Carefully Is Important*, HELLOFLO (Mar. 16, 2016), http://helloflo.com/survivor-vs-victim-why-choosing-your-words-carefully-is-important/ [https://perma.cc/EN2L-XKJK] (explaining that the word "victim" implies helplessness and invokes a sensation of pity, but the word "survivor" invokes the sense that a person can take back control of their life).

18. *See* U.S. DEP'T OF DEF., STATISTICAL DATA ON SEXUAL ASSAULT 15, 19 (2016), http://www.sapr.mil/public/docs/reports/FY16_Annual/Appendix_B_Statistical_Section.pdf [https://perma.cc/LP2F-YJXQ] (noting that out of over 6,000 reports of sexual assault, 1,331 were deemed to have had substantiated claims, and of those, only 791 court-martials were initiated).

19. *See* LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 5A.02 (Matthew Bender ed., 2018).

20. *See* Feres v. United States, 340 U.S. 135, 146 (1950).

21. *See generally* Ann-Marie Woods, *A "More Searching Judicial Inquiry": The Justiciability of Intra-Military Sexual Assault Claims*, 55 B.C. L. REV. 1329 (2014); Jonathon Turley, Pax Militaris*: The* Feres *Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003); Anne R. Riley, United States v. Johnson*: Expansion of the* Feres *Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees*, 42 VAND. L. REV. 233 (1989).

22. *See* Stencel Aero Eng'g Corp. v. United States, 431 U.S. 666, 671-73 (1976).

23. *See infra* Part III (analyzing a potentially viable test for defining the "incident to service" test).

repeatedly refused to define or create a rule for this exception, instead stating that it is Congress's duty to provide further explanation.[24] The broad application of the "incident to service" standard has halted military service members' pursuit of justice.[25] While there are foreseeable reasons for having the *Feres* Doctrine in place, such as the prevention of suits brought for injuries that occur during the normal course of a highly dangerous profession, the broad application of the "incident to service" standard runs counter to the legislature's intent for the FTCA.[26] Because the Supreme Court has created the language of "incident to service," it is the responsibility of the Court, not Congress, to define the standard.[27]

Part I of this Note examines the military's sexual assault policies and procedures through the lens of the infamous Tailhook scandal.[28] It also details the current reporting procedures, investigation schema, and proposed legislation to rectify reporting issues within the military.[29] Part II analyzes the *Feres* Doctrine and the ambiguous "incident to service" standard.[30] Finally, Part III argues that the Supreme Court must adopt a new test for the "incident to service" standard that equitably weighs the interest of justice for the survivor and the original intent of Congress.[31]

I. THE MILITARY'S SEXUAL ASSAULT PROBLEM

In the aftermath of the Tailhook incident—a public military disaster—the military implemented changes to rectify the protocols

24. *See* United States v. Shearer, 473 U.S. 52, 57 (1985); *see also* Feres v. United States, 340 U.S. 135, 146 (1950).

25. *See* JAYSON & LONGSTRETH, *supra* note 19, § 5A.02 (explaining the difficulties service member litigants face in order to pursue a claim against the government).

26. *See generally The* Feres *Doctrine: An Examination of This Military Exception to the Federal Tort Claims Act: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2002) [hereinafter Committee Hearing] (arguing that the broad application of the *Feres* Doctrine has unnecessarily hindered military victims and their families from recovering from the military's negligence).

27. *See infra* Part III (explaining how the court should interpret the "incident to service" standard in particular circumstances).

28. *See infra* Part I (detailing the reporting schema of the past and how it has changed to its current form).

29. *See infra* Part I (emphasizing reporting issues manifested within reporting schemas).

30. *See infra* Part II (detailing *Feres* and its progenies and their effects on governmental litigation).

31. *See infra* Part III (proposing a new analysis for the "incident to service" standard).

for responding to sexual assault that were in place as the time.[32] These changes included implementing a military reporting system and having criminal investigations remain within the military sector.[33] However, because of this private criminal reporting and investigative system, survivors are sometimes unsatisfied with their options for justice.[34]

A. Tailhook and Its Aftermath

Beginning in 1956, the annual Tailhook Convention started as a naval reunion; it quickly expanded to include a number of naval aviation seminars and professional development activities.[35] However, the unofficial reputation of the 1991 Tailhook Convention was that of an out of control "frat" party like those seen in movies or on TV.[36] This reputation and the history of rowdy behavior manifested itself in the existence of the "gauntlet," an unofficial section of the hotel where most of the sexual assault incidents took place.[37] Over the course of the weekend, ninety men and women were sexually assaulted at the 1991 Tailhook Convention.[38] Between September 5 and September 7, 1991, the United States Navy opened the country's eyes to a problem plaguing the military through one of its most embarrassing moments.[39]

32. *See infra* Sections I.A-C (detailing the Tailhook scandal).

33. *See* Woods, *supra* note 21, at 1350 (explaining that the primary investigator and first adjudicator of sexual assault cases is the commanding officer, not public police investigators, and these officers have incentives to dismiss claims within their units).

34. *See* THE INVISIBLE WAR (Chain Camera Pictures 2012) (detailing the struggles survivors must go through in reporting their assaults and how these results have the possibility of negatively affecting their careers).

35. *See* OFFICE OF THE INSPECTOR GEN., THE TAILHOOK REPORT: THE OFFICIAL INQUIRY INTO THE EVENTS OF TAILHOOK '91, 15 (1993). The Tailhook Association, the organizer of the convention, was a private organization comprised of active duty, reserve, and retired Navy and Marine Corps aviators. *See id.* The association was named after the hook that grabs planes when they land on carrier decks. *See Tailhook: Scandal Time*, NEWSWEEK (July 5, 1995), http://www.newsweek.com/tailhook-scandal-time-200362 [https://perma.cc/3JAE-YQG3]. During this time the event moved from San Diego to Las Vegas. *See id.*

36. *See* NEWSWEEK, *supra* note 35.

37. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 35, at 38. Most of the assaults took place in the third-floor corridor known as the "gauntlet." *Id.* Here, women would be groped, undressed, and assaulted by officers as they made their way back to their rooms. *See* T. S. NELSON, FOR LOVE OF COUNTRY: CONFRONTING RAPE AND SEXUAL HARASSMENT IN THE U.S. MILITARY 57 (2002).

38. *See* Michael Winerip, *Revisiting the Military's Tailhook Scandal*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/13/booming/revisiting-the-militarys-tailhook-scandal-video.html [https://perma.cc/L5T4-9XEL].

39. *See generally* NELSON, *supra* note 37.

The Tailhook incident began a national conversation about sexual assault within the United States military, resulting in major changes and personnel shake-ups.[40]

Lieutenant Paula Coughlin, an admiral's aide who was assaulted during the convention, was one of the first survivors to speak publicly about the crimes that occurred at Tailhook.[41] When she first reported what took place to her superior officer, her superior officer treated it as nothing more than an out of control party.[42] A serious investigation started only after the news about the assaults broke nationwide.[43] At the conclusion of the investigation, the Inspector General found a total of ninety sexual assault survivors from the 1991 Tailhook Convention.[44]

Despite the utter embarrassment and mishandling of the initial Tailhook incident, it was not until 2005 that the military created a sexual assault response and prevention program.[45] Today, each branch of the military has a specialized program for the sole purpose of responding to issues of sexual assault.[46] The main office for sexual assault education and prevention in the DOD is the Sexual Assault Prevention and Response Office (SAPRO), and it is responsible for

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40. *See id.* at 58-59. It was not until Paula Coughlin went public with what happened to her did the military take real action. *See id.* The Secretary of the Navy, H. Lawrence Garrett III, resigned and the Acting Secretary of the Navy, J. Daniel Howard, supported numerous changes including: a one-day stand-down; the development of a Standing Committee on Women in the Navy and Marine Corps; the introduction of sexual harassment as an offence under the UCMJ; and a call to all involved in the 1991 Tailhook scandal to come forward. *See id.*

41. *See id.* at 57.

42. *See* NEWSWEEK, *supra* note 35. "Even though scores of drunken officers assaulted at least 26 women, 14 of them officers, the navy initially treated Tailhook '91 as little more than a fraternity party that got out of hand." *Id.* When Lt. Coughlin reported the assault the next day to her superior officer, he acknowledged the behavior but minimized it and blamed her for being around the drunken group. *See* NELSON, *supra* note 37, at 58.

43. *See* NELSON, *supra* note 37, at 58.

44. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 35, at 55. The investigation found that forty-nine civilian women, twenty-one Navy women, six female government employees, six female military spouses, five Navy men, two Marine Corps men, and one Air Force woman were all assaulted during the convention weekend. *See id.*

45. *See Mission & History*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., www.sapr.mil/index.php/about/mission-and-history [https://perma.cc/MQ75-SGZW] (last visited Nov. 26, 2018) (explaining the history of the SAPRO office).

46. *See id.* The Army calls its sexual assault prevention program the Sexual Harassment/Assault Response & Prevention Program (SHARP), while the Coast Guard, National Guard, Navy, Marine Corps, and Air Force have all named their programs the Sexual Assault Prevention & Response Program (SAPR). *See id.*

the oversight of the DOD sexual assault policy.[47] SAPRO provides resources and information about sexual assault statistics in the military, options for survivors of military sexual assault, and public information about DOD sexual assault policy.[48] SAPRO works hand in hand with the Uniform Code of Military Justice (UCMJ) to further the goal of military law.[49] The SAPRO program oversees rape, sexual assault, aggravated sexual conduct, abusive sexual contact, and nonconsensual sodomy.[50] Though a benefit to the military, there has been criticism that SAPRO promotes a culture of victim blaming.[51]

B. Reporting Sexual Assault in the Military

Under SAPRO, when military sexual assault is investigated, the investigation is contained within the "island" of the United States military.[52] This island comes with specialized reporting options and investigation processes that differ from nonmilitary investigations.[53] These differences can be problematic because of the reliance on untrained military command to decide whether investigations will

47. *See id.* One of its purposes is to work together with the Armed Services and the civilian community to develop and implement sexual assault response and prevention programs. *See SAPRO Homepage*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://sapr.mil/index.php [https://perma.cc/S5ZG-3DT4] (last visited Nov. 26, 2018).

48. *See About SAPRO*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://sapr.mil/index.php/about [https://perma.cc/57F6-G9EL] (last visited Nov. 26, 2018). These program initiatives, reports, and public policies can be found on the SAPRO homepage. *See id.*

49. *See SAPR & The Uniform Code of Military Justice (UCMJ)*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://sapr.mil/index.php/policy/sapr-the-ucmj [https://perma.cc/6LXY-L2Q5] (last visited Nov. 26, 2018). "The [UCMJ] manual states that the purpose of military law is 'to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.'" *Id.*

50. *See id.* The SAPR program excludes intimate partner sexual assault and child sexual assaults, sexual harassment, and Military Sexual Trauma (MST), a term that refers to trauma from sexual assault and sexual harassment. *See id.*

51. *See* THE INVISIBLE WAR, *supra* note 34 (explaining that some of the SAPRO programming makes survivors feel as if the assault that took place was their fault).

52. *See* Woods, *supra* note 21, at 1349-50. "This judicial deference, coupled with the military's legal system positioned as an island within America's civil legal and social framework, together form much of the barrier to justice faced by military victims." *Id.*

53. *See Reporting Options*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://www.sapr.mil/index.php/reporting-options [https://perma.cc/A47J-44QR] (last visited Nov. 26, 2018) (listing various reporting options and investigative processes).

proceed.[54] Due to these problems, Congress has attempted to promulgate legislation aimed at addressing the concerns raised by sexual assault survivors and available reporting data.[55]

1. *Reporting Issues: The Chain of Command*

Each year, the DOD releases a report on sexual assault statistics, prevention program initiative progress, and general information regarding sexual assault within the military.[56] In 2016, the DOD reported approximately 14,900 incidents of sexual assault.[57] This number is an estimated total of service members who indicated that they experienced some form of sexual assault during the year.[58] Of the approximately 14,900 survivors, 5,350 filed reports with the DOD.[59]

Procedurally, when survivors of sexual assault report their assault, they have two options: restricted reporting and unrestricted reporting.[60] Restricted reporting is an option for adult survivors who want to confidentially report the crime without triggering an official investigation process or notifying command.[61] The details of the crime do not extend past the survivor, the Sexual Assault Response Coordinator (SARC), the SAPR Victim Advocate (VA), and the doctors and nurses.[62] Unrestricted reporting is recommended to adult survivors who want to pursue an investigation into their assault.[63] In

54. *See* Military Justice Improvement Act of 2014, S. 992, 113th Cong. (2014) (detailing a bill introduced by Senator Kristin Gillibrand to address the issue of reporting sexual assault in the military).

55. *See id.*

56. *See generally* U.S. DEP'T OF DEF., *supra* note 16 (examining the number of reported and approximated sexual assaults in fiscal year 2016).

57. *Id.* at 12. This number represents an estimate of the number of sexual assaults that took place that year, with 68% unreported and 32% reported cases. *Id.*

58. *See id.* at 38 n.i ("Based on a constructed 95 percent confidence interval ranging from 14,000 to 15,700, an estimated total of 14,900 DOD active duty members indicated experiencing a sexual assault in the past 12 months.").

59. *Id.* at 8.

60. *See Reporting Options*, *supra* note 53.

61. *See id.*

62. See *Restricted Reporting*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://www.sapr.mil/index.php/restricted-reporting [https://perma.cc/G642-N3ST] (last visited Nov. 26, 2018). If a survivor follows a restricted reporting option, they may change the status to unrestricted at any time with the caveat that certain evidence will be lost. *See id.*

63. *See Unrestricted Reporting*, SEXUAL ASSAULT PREVENTION & RESPONSE OFF., http://www.sapr.mil/index.php/unrestricted-reporting [https://perma.cc/L4XR-H7SX] (last visited Nov. 26, 2018). The SAPRO website provides information on unrestricted reporting by explaining what unrestricted reporting is, what the investigation process is, considerations a service member should keep in mind when

unrestricted reporting, the details of the assault not only reach the survivor, the military health professional, and the specific military personnel, but they also reach up the survivor's chain of command, which has the discretion to investigate the crime.[64]

When a survivor decides to file an unrestricted report on his or her sexual assault, the investigation process begins.[65] The process, which can be frustrating and stressful, may take many months to conclude.[66] Survivors are usually interviewed soon after the assault takes place in order to gather crucial details about the crime that may fade as time passes.[67] In the current system, the commanding officer holds the discretion in pursuing a sexual assault case.[68] This discretion often leads to a decrease in survivor reporting because, rather than having their disciplinary decisions called into question, commanding officers have significant incentives to dismiss claims.[69] The criticisms of the current system have been so far-reaching that it has caught the

deciding whether unrestricted reporting is the best decision, and an example of the unrestricted reporting process for a service member. *See id.*

64. *See id.* With an unrestricted reporting option, survivors can report their assault through a variety of different avenues. *See id.* These avenues include: reporting to law enforcement who will then initiate an investigation and begin a "report of investigation"; reporting to their commander who will immediately contact the MCIO and begin a "report of investigation"; reporting to the SARC who will file a "DD Form 2910" where the survivor will choose their reporting option; reporting to a SAPR VA who will also file a "DD Form 2910"; or reporting to a health care provider who will contact the SARC to fill out the "DD Form 2910." *Id.*

65. *See id.*

66. *See id.* "The nature of the investigative process can be stressful for victims of sexual assault despite the sincere efforts of law enforcement, staff judge advocates and other personnel entrusted with holding offenders appropriately accountable." *Id.*

67. *See id.* This quick interview process, which includes probing and triggering questions about the incident, can often be uncomfortable for survivors who have not fully processed their assaults. *See id.*

68. *See* Woods, *supra* note 21, at 1350 (explaining that commanding officers hold a lot of power in deciding whether a case should be pursued and some extenuating circumstances, like one's reputation, may lead to dismissing legitimate claims).

69. *See id.* Commanding officers often participate in victim blaming tactics to dismiss the credibility of the survivor in order to prevent viable claims to proceed through the justice system. *See id.*

attention of the public[70] and has prompted legislative proposals from United States senators.[71]

2. *Legislation*

In 2013, United States Senator Kristen Gillibrand introduced a bill that would restructure how sexual assaults were handled within the military, titled the Military Justice Improvement Act (MJIA).[72] More specifically, the MJIA would amend the UCMJ to state that the Secretaries of Defense and the Department of Homeland Security must require the secretaries of the military departments to modify the process of determining whether to try, by court martial, a service member accused of: (1) certain UCMJ offenses for which the maximum punishment is more than one year in prison; (2) conspiracy, solicitation, or an attempt to commit such offenses; or (3) retaliation or obstruction of justice regardless of the maximum punishment for that offense.[73] Currently, decisions to initiate court-martial proceedings are at the discretion of the accused's chain of command; however, Senator Gillibrand's legislation would require that these determinations be made by a commissioned officer outside of the chain of command who could also serve as trial counsel.[74]

The legislation recognizes that the survivor's assailant is often someone within his or her own chain of command, which makes reporting difficult.[75] The MJIA removes the systemic fear service members face when reporting their sexual assaults.[76] The MJIA would move the decision to prosecute serious crimes to independent military prosecutors, leaving uniquely military crimes within the chain of command.[77] Additionally, various national veteran organizations have

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70. *See* Robert Draper, *The Military's Rough Justice on Sexual Assault*, N.Y. TIMES (Nov. 26, 2014), https://www.nytimes.com/2014/11/30/magazine/the-militarys-rough-justice-on-sexual-assault.html [https://perma.cc/92QK-JQLE] (explaining that the reversal of sexual assault charges by the perpetrator's commanding officer resulted in outrage from the civilian world).

71. *See Military Justice Improvement Act*, KIRSTEN GILLIBRAND, www.gillibrand.senate.gov/mjia [https://perma.cc/VEC4-VZKL] (last visited Nov. 26, 2018).

72. *See id.*

73. *See* Military Justice Improvement Act of 2014, S. 2992, 113th Cong. (2014).

74. *See id.*

75. *See Military Justice Improvement Act*, *supra* note 71.

76. *See id.*

77. *See id.* The crimes left within the chain of command would include thirty-seven serious crimes uniquely military in nature, and all crimes punishable by less than one year in prison. *See id.*

supported the MJIA.[78] On November 16, 2017, Senator Gillibrand reintroduced the Military Justice Improvement Act of 2017 in the Senate, where it was read twice and referred to the Committee on Armed Services.[79] Legislation like the MJIA is important because service members are not afforded the same remedy avenues available to civilians.[80] For years, the United States government enjoyed unfettered sovereign immunity, which came to an end in 1946.[81] Although legislation has passed removing much of the immunity once enjoyed by the United States government, the immunity has not been completely extinguished.[82]

C. The Federal Tort Claims Act

The FTCA states that the United States is liable to the same extent as a private individual or tortfeasor under like circumstances.[83] Congress passed the legislation in 1946, and it gained public attention following the 1945 B-25 plane crash into the Empire State Building.[84] Congress had a variety of reasons for enacting the FTCA, chief among them being the desire to transfer responsibility for deciding tort claims from Congress to the courts.[85] Additionally, Congress recognized the

78. *See id.* The MJIA was endorsed by Iraq & Afghanistan Veterans of America (IAVA), Vietnam Veterans of America (VVA), Service Women's Action Network (SWAN), National Women's Law Center (NWLC), Protect Our Defenders, and the National Task Force to End Sexual and Domestic Violence Against Women. *See id.*

79. *See* Military Justice Improvement Act of 2017, S. 2141, 115th Cong. (2017).

80. *See* JAYSON & LONGSTRETH, *supra* note 19, § 5A.02 (explaining the legal barriers military service members face because of their status as military personnel).

81. *See* Legislative Reorganization Act of 1946, 60 Stat. 812 (1946) (defined as an Act "[t]o provide for increased efficiency in the legislative branch of the Government").

82. *See* JAYSON & LONGSTRETH, *supra* note 19, § 5A.02 (noting that the Supreme Court has determined that "incident to service" bars all claims brought by a service member against the government and there should not be a case-by-case inquiry into whether judicial review would in fact interfere with how the military operates).

83. *See* JEROME H. NATES ET AL., DAMAGES IN TORT ACTIONS § 46.01 (Matthew Bender ed., 2018).

84. *See* Joe Richman, *The Day a Bomber Hit the Empire State Building*, NPR (July 28, 2008, 11:23AM), www.npr.org/templates/story/story.php?storyId=92987873 [https://perma.cc/DR3X-59UA]. At the end of World War II, a bomber was flying a routine transportation mission to LaGuardia Airport during a foggy day. *See id.* Due to nearly zero visibility, the pilot crashed into the side of the Empire State Building, killing himself and thirteen others. *See id.* Eight months after the crash, families of some of the victims sued the government. *See id.*

85. *See* Paul F. Figley, *Understanding the Federal Tort Claims Act: A Different Metaphor*, 44 TORT TRIAL & INS. PRAC. L.J. 1105, 1107 (2009). Additional

issue Americans faced by having the government retain absolute sovereign immunity.[86] Sovereign immunity requires the sovereign state to consent to being sued, and prior to the Act's enactment, citizens could not sue the government for tortious injuries.[87] Congress sought to remedy this prior to passing the FTCA; however, each piece of legislation that passed either explicitly or implicitly excluded tort claims.[88] As the number of claims increased, Congress no longer wanted to spend exceeding amounts of manpower and time on the issue.[89] So on August 2, 1946, Congress passed the FTCA after reviewing over thirty bills on the matter.[90]

The various sections of the Act outline who is considered a member of the government for purposes of application,[91] the liability parallels between the government and private individuals,[92] and the areas excluded from the Act.[93] While the FTCA extinguishes the government's former absolute sovereign immunity, the government has retained small pockets of immunity through the various exclusions contained in the Act.[94] Most notably, the Act excludes eleven intentional torts.[95] As it pertains to military service members, the Act explicitly excludes claims arising out of combatant activities during times of war.[96]

Although the FTCA does not include provisions that expressly preclude a service member from bringing a claim against the United States, the Supreme Court has interpreted the Act to exclude the

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reasons for passing the legislation include acting as an administrative procedure that resolves the majority of tort claims against the government without litigation and granting the federal courts subject matter jurisdiction over the claims, pursuant to limitations set by Congress. *See id.*

86. *See id.* ("Before Congress enacted an applicable waiver of sovereign immunity, Americans injured by torts of the federal government could not sue it for damages.").

87. *See id.*

88. *See id.* at 1107-09 (explaining the various pieces of the legislation Congress passed, each having different remedies for a wide range of claims).

89. *See id.* at 1109 (detailing that as the number of claims increased, resolving them become more laborious).

90. *See id.* The Act was a part of the Legislative Reorganization Act of 1946. *See id.*

91. *See* 28 U.S.C. § 2671 (1948) (defining "federal agency," "employee of the government," and "acting within the scope of his office or employment").

92. *See* § 2674.

93. *See* § 2680.

94. *See id.*

95. *See* Figley, *supra* note 85, at 1127. Assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of power, libel, slander, misrepresentation, deceit, and interference with contract rights are all excluded under the Act. *See* § 2680(h).

96. *See* § 2680(j).

majority of service member claims.[97] Derived from § 2680(j) of the Act, which expressly excludes claims brought by service members whose claims arise out of combatant activities during time of war, the Court has determined that recovery depends on whether the injury relates to the service member's military service.[98] This interpretation is embodied in the *Feres* Doctrine.[99] While the FTCA has exposed the government and the military to liability, and, while Congress has sought to change the way the military handles sexual assault, survivors are still stymied from receiving justice because of the Doctrine.[100]

II. THE *FERES* DOCTRINE

While the FTCA allows the United States to be held liable to the same extent as a private individual, the *Feres* Doctrine holds that the Government is not liable for injuries to service members when they arise from activities incident to service.[101] Because the Court has created such an ambiguous interpretation of the FTCA military exclusion through its *Feres* holding, lower courts have had to create their own tests for the meaning of "incident to service."[102] However, the people who ultimately suffer from the courts' interpretations of "incident to service" are service members who are raped and sexually assaulted during their military careers.[103]

A. Two Roads to Two Realities

A service member's possibility of recovery turns on the phrase "incident to service," essentially making two avenues for courts to follow in their decision making: the *Brooks* rationale and the *Feres*

97. *See* JAYSON & LONGSTRETH, *supra* note 19, § 5A.01 ("[T]he fact that the claimant was a member of the armed forces of the United States when he sustained injury or loss as a result of the wrongs of another federal employee, does not of itself preclude recovery under the Federal Tort Claims Act. . . . The Supreme Court, however, has construed the Act as containing both an exclusion and a limitation with regard to such claims.").

98. *See id.*; *see also* § 2680(j).

99. *See* JAYSON & LONGSTRETH, *supra* note 19, § 5A.01

100. *See generally id.* (explaining that because of the *Feres* Doctrine, many service member claims against the military are dismissed).

101. *See* Figley, *supra* note 85, at 1116. "[T]he Government is not liable under the [FTCA] for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* (quoting Feres v. United States, 340 U.S. 135, 141 (1950)).

102. *See* JAYSON & LONGSTRETH, *supra* note 19 (explaining that when an injury is incident to service, the civilian court lacks subject matter jurisdiction over the claim).

103. *See* Doe v. Hagenbeck, 870 F.3d 36, 39 (2d Cir. 2017).

rationale.[104] When a court determines that a claim falls too far outside the scope of military service, the service member is permitted to bring a claim: a *Brooks* rationale.[105] However, if the claim falls under the mantle of "incident to service," that service member is barred from bringing a claim: a *Feres* rationale.[106]

1. *Brooks v. United States*

When a court rules that an injury occurred outside the scope of a service member's military service, the court applies the decision in *Brooks v. United States* and allows the case to proceed.[107] In February 1945, Arthur Brooks, a service member, was killed while driving off-duty and off-base when a civilian Army employee driving a United States Army truck struck his car.[108] The Court found that the Act gave district courts subject matter jurisdiction over any claim founded in negligence and brought against the United States.[109] The Court did not believe that *any* claim meant "any claim but that [brought by] servicemen."[110] In fact, the legislation current at the time did not include that absolute exclusion.[111]

The government argued that if the Court allowed service members to sue it, the consequences would hinder the discipline and order needed to operate the armed forces.[112] The Court, however, reiterated that the language of the FTCA and the specific facts of the case did not support the government's argument.[113] It stated that the case resulted from an injury sustained outside of Brooks's military service.[114] Had the facts illustrated that his injuries were connected to

104. *See* JAYSON & LONGSTRETH, *supra* note 19.
105. *See id.*
106. *See id.*
107. *See id.*
108. *See* Brooks v. United States, 337 U.S. 49, 50 (1949).
109. *See id.* at 51.
110. *Id.* Further, the Court acknowledged that eighteen tort claims bills were introduced in Congress between 1925 and 1935, and all but two bills contained explicit exceptions denying recovery to service members. *See id.*
111. *See id.* at 52 (explaining that the passed Act included only an exclusion of claims for which the World War Veterans' Act of 1924 provided compensation).
112. *See id.* at 52-53. The Government cited incidents like a commander's poor judgment during battle, defective military equipment, and a military surgeon's medical malpractice incidents as grounding the United States in tort actions. *See id.*
113. *See id.* "The Government's fears may have point in reflecting congressional purpose to leave injuries incident to service where they were, despite literal language and other considerations to the contrary." *Id.*
114. *See id.* (concluding that the facts presented explained that the injury had nothing to do with Brooks' service, and the connection between the injury and his service was too attenuated).

his service, the Court would have reached a different result.[115] The antithesis of *Brooks* is the Supreme Court's decision and analysis in *Feres v. United States*.[116]

2. *Feres v. United States*

Consolidating three cases with similar facts,[117] the Supreme Court looked at whether the FTCA extends to injuries sustained "incident to service."[118] The Court further clarified that *Feres* was a "wholly different case" than *Brooks*.[119] While already established in the Act itself and in *Brooks*, the Court reconfirmed that the Act contemplates actions brought against the government for the negligence of military personnel.[120] The Court, however, believed that in its language, the Act is ambiguous in deciding when a service member's claim may be successfully brought against the government.[121] Nonetheless, the Court proceeded to give three reasons for why the unique relationship between a service member and the armed services renders application of the FTCA impracticable.[122]

First, the Court stated that no claim brought by a service member against the government could parallel a private cause of action—a requirement of the FTCA.[123] The Court knew of no American law that allowed a service member to recover damages for negligence from a

115. *See id.* at 52

116. *See* Feres v. United States, 340 U.S. 135, 146 (1950).

117. *See id.* at 138. The *Feres* case involved the decedent perishing in a fire caused by a faulty heating system in the Pine Camps barracks, the *Jefferson* case involved the plaintiff suing the United States Government for medical malpractice after a surgeon left a towel inside of his wound after surgery, and the *Griggs* case involved an executrix suing the government after a surgery performed by unskilled surgeons resulted in the decedent's death. *See id.* at 136-37.

118. *See id.* at 138.

119. *See id.*

120. *See id.* at 138.

121. *See id.* at 138-39. ("We also are reminded that the Brooks case, in spite of its reservation of service-connected injuries, interprets the Act to cover claims not incidental to service, and it is argued that much of its reasoning is as apt to impose liability in favor of a man on duty as in favor of one on leave. These considerations, it is said, should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language if the liability here asserted should prove so depleting of the public treasury as the Government fears.").

122. *See* Michael Rust, Comment, *Expansion of the Feres Doctrine*, 32 EMORY L.J. 237, 240-41 (1983) (stating that there are four rationales for the Feres Doctrine, three of which are cited in the Feres case opinion).

123. *See id.* at 241; *see also* 28 U.S.C. § 2674 (1948); Feres v. United States, 340 U.S. 135, 141 (1950).

superior officer or the Government.[124] The Court acknowledged that parallels could be found if the statuses of the parties were stripped, leaving only the specific circumstances of the injury.[125] However, it held that the Act does not create new liabilities, and stripping the statuses would create "novel and unprecedented liabilities."[126]

Next, the Court looked at the FTCA requirement that the applicable law of each FTCA suit shall be the law of the place where the incident occurred.[127] The Court explained that since a service member is required to serve in multiple locations at any given time, the location of the injury would determine the law to be followed, and that distinction would make little sense.[128] Noting that different states have varying provisions regarding limitations of liability, assumption of the risk, comparative negligence, and more, the Court assumed that it would be irrational to leave service members dependent upon rules of law over which they have no control.[129]

Third, the Court reasoned that service members were entitled to recover through other avenues, and it was not clear whether Congress intended for the Act to be interpreted to provide for multiple types of remedies for the same action.[130] Additionally, the Court stated that since service members are at a disadvantage in litigation due to lack of time and resources, relying on the already-established remedies would be more beneficial to them.[131] Ultimately, the Court decided that

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124. *See Feres*, 340 U.S at 141. Additionally, the Court states that a private individual does not have the power to command or mobilize a private army with the authority similar to that of the Government over the armed forces. *See id.* at 141-42.

125. *See id.* at 142.

126. *See id.*

127. *See id.* (quoting 28 U.S.C. § 1346(b) ("It is not without significance as to whether the Act should be construed to apply to service-connected injuries that it makes '. . . the law of the place where the act or omission occurred' govern any consequent liability.")).

128. *See id.* at 143.

129. *See id.* Since a soldier could be stationed in over forty-eight states, the Panama Canal, Alaska, and Hawaii, the Court reasoned that it would be best if a soldier did not have to worry about what laws would be applicable in their exact case. *See id.*

130. *See id.* at 144. The Court contemplated multiple ways to address the multiple compensation avenues through options like allowing the service member to: "[1] enjoy both types of recovery, or [2] elect which to pursue, thereby waiving the other, or [3] pursue both, crediting the larger liability with the proceeds of the smaller, or [4] [] [none of the options mentioned because] the compensation and pension remedy excludes the tort remedy." *Id.*

131. *See id.* at 145 (adding that already established compensation systems do not require litigation for recovery).

it would be best if the service members were restricted from bringing a claim all together.[132]

In its conclusion, the Court distinguished *Feres* from *Brooks*.[133] While Brooks was on furlough, driving on a highway, and under no military or mission related orders when an Army truck hit his car, the service members in *Feres* sustained their injuries while on active duty and under the military's supervision.[134] Their injuries were thus sustained incident to their service, therefore precluding them from recovering under the FTCA.[135]

B. "Incident to Service"

The distinction between *Brooks* and *Feres* turns on the meaning of "incident to service."[136] Although the phrase does not appear anywhere in the FTCA, it did appear in the Military Personnel Claims Act (MPCA), a piece of legislation superseded by the FTCA.[137] The actual language of the FTCA, instead, excludes any claim that arises out of "combatant activities . . . during time of war."[138] In its *Feres* decision, the Court developed the terminology of "incident to service" without actually creating a test to define it.[139] However, the Court has broadened the *Feres* rationale to bar claims that require civilian courts to second-guess military decisions.[140]

In *Shearer v. United States*, the Court held that the decedent's estate could not bring a negligence suit against the United States because doing so would be an improper judicial intrusion by a civilian court.[141] While off-duty and away from base, Private Vernon Shearer was kidnapped and murdered by Private Andrew Heard.[142] The decedent's administrator alleged that the Army knew Private Heard was a danger to the public but failed to reasonably control him and

132. *See id.*

133. *See id.* at 146.

134. *See id.* The Court emphasized that the two cases were different because Brooks was not under compulsion of orders or duty and was not on a military mission. *See id.*

135. *See id.*

136. *See* JAYSON & LONGSTRETH, *supra* note 19 (explaining that this distinction is a question of fact).

137. *See id.*

138. 28 U.S.C. § 2680(j) (1948).

139. *See* Cioca v. Rumsfeld, 720 F.3d 505, 512 (4th Cir. 2013). The incident to service principle "cannot be reduced to a few bright line rules." *Id.* (quoting United States v. Shearer, 473 U.S. 52, 57 (1985)).

140. *See Shearer*, 473 U.S. at 57.

141. *See id.* at 57-59.

142. *See id.* at 53.

failed to warn others of his release from German prison.[143] The Court of Appeals for the Third Circuit had considered the fact that Private Shearer was off-duty and off base when he was murdered, analogizing the facts to the Court's decision in *Brooks*.[144] But in its ultimate decision, the Supreme Court held that where the injury took place is far less important than whether the suit would require civilian courts to second-guess military decisions.[145] This second-guessing would essentially impair military discipline.[146]

Decisions like *Shearer*, which focus on the fear of decreased military discipline and efficiency, have only led to more confusion as to what the standard for "incident to service" is.[147] With the focus on military discipline so prevalent, the courts do not really know how to rule.[148] Because of the Supreme Court's inability to define "incident to service," lower courts have taken it upon themselves to apply their own rules to the ambiguous analysis.[149] While some elements considered in the analysis are similar among the circuits, how the circuits specifically approach these elements differs.[150] However, these different approaches have key elements that could, in combination, lead to a better application of the *Feres* Doctrine.[151]

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143. *Id.* at 54. Prior to the murder, Pvt. Heard had been released from a German prison having served a four-year sentence for manslaughter while stationed at an Army base in Germany. *See id.*

144. *See id.* at 58.

145. *See id.* at 57.

146. *See id* at 58. "To permit this type of suit would mean that commanding officers would have to stand prepared to convince a civilian court of the wisdom of a wide range of military and disciplinary decisions; for example, whether to overlook a particular incident or episode, whether to discharge a serviceman, and whether and how to place restraints on a soldier's off-base conduct." *Id.*

147. *See* JAYSON & LONGSTRETH, *supra* note 19 (explaining that since there are no bright line rules for deciding what is "incident to service" the lower courts have been left to create their own tests).

148. *See id.* (examining the pattern of the Supreme Court stating that the primary consideration is civilian interference in military decision-making and the lower courts rejecting a case-by-case analysis of that standard).

149. *See id.* (explaining that most courts have approached the "incident to service" conundrum by adopting multi-factor tests).

150. *See id.* The Fifth, Eighth, and Ninth Circuit Courts of Appeals have all adopted their own multi-prong tests for the issue. *See id.*

151. *See generally* Adams v. United States, 728 F.2d 736 (5th Cir. 1984); *see also* Costo v. United States, 248 F.3d 863, 867-69 (9th Cir. 2001); Brown v. United States, 739 F.2d 362, 366-68 (8th Cir. 1984).

1. *The Fifth Circuit: Adams v. United States*

The Court of Appeals for the Fifth Circuit decided that multiple factors needed to be considered when deciding the applicability of the *Feres* Doctrine in *Adams v. United States*.[152] Robert Oatis, a former service member, died after suffering a heart attack during a circumcision procedure performed by military surgeons.[153] After the surgery, the hospital reached out to the Army to request information on the decedent's military status, which the Army described as "indefinite excess leave."[154] The court relied on the test it created in *Parker v. United States* to determine whether the injuries in *Adams* fell under the *Feres* Doctrine analysis.[155] The three-part test required the court to analyze: (1) the duty status of the service member; (2) the place where the injury occurred; and (3) the activity of the service member at the time of the injury.[156] The court noted that while no single factor is dispositive, the duty status of the service member has been the most indicative of the relationship between the service member and the government at the time of the injury.[157] The court held that duty status was to be viewed as a spectrum with actual active duty and discharge at the two extremes.[158] Thus, it held that since the Army did all that it could to sever the status ties between itself and the decedent, the duty status of the decedent did not fall within the scope of the *Feres* standard.[159] The court held that the *Feres* standard did not apply because holding that the Army's actions were not equivalent to a discharge would be tantamount to holding that any former service member could refuse to complete part of the discharge process and reap the benefits of the military for the rest of his or her life.[160]

152. *See Adams*, 728 F.2d at 738-39.

153. *See id.* at 737. Oatis' survivors, Debra Adams and Bernita Holmes, brought this claim. *See id.*; *see also* Isabel Teotonio, *Why Adult Men Are Getting Circumcised*, STAR (Jan. 9, 2012), https://www.thestar.com/life/2012/01/09/why_adult_men_are_getting_circumcised.html [https://perma.cc/4WD6-PYWY] (explaining that adult men are circumcised for a variety of reasons including: religious identification, improved hygiene, sexual performance, and aesthetics).

154. *See Adams*, 728 F.2d at 738. The decedent had been court-martialed and released from the Army after being found in possession of drugs. *See id.* at 737.

155. *See id.* at 738 (referencing Parker v. United States, 611 F.2d 1007 (5th Cir. 1980)).

156. *See id.* at 739.

157. *See id.*

158. *See id.*

159. *See id.*

160. *See id.* at 739-40. The court noted that the Army discharged Oatis to the best of their ability, and it was Oatis' responsibility to report to Fort Polk to complete the remaining paperwork. *See id.* at 739.

2. *The Eighth Circuit: Brown v. United States*

In *Brown v. United States*, the Court of Appeals for the Eighth Circuit created a two-part test to determine the applicability of the *Feres* Doctrine.[161] The victim's mother brought suit against the military under the FTCA for injuries her son sustained during a racially motivated hanging.[162] The Eighth Circuit's two-part *Feres* analysis asked whether there was a relevant relationship between the service member's activity at the time of the act and his or her military service and whether the action heard through civil litigation would impede military discipline.[163]

To determine whether a relevant relationship existed between a service member's activity and his or her military service, the court looked at three prominent rationales previously deemed important: (1) the duty status of the service member; (2) the location where the injury occurred; and (3) the nature of the activity.[164] Applying the specific facts of the case,[165] the court reasoned that the duty status of the service member is not a strong enough indicator that military immunity should be applied.[166] For the second rationale, the court recognized that some courts hold the location of the injury as a *per se* bar to recover under *Feres*.[167] The court, however, held that while that rationale must be considered, it alone is not dispositive.[168] Lastly, in determining the relevance of the nature of the activity, the court inquired into the actual activity at the time of the injury.[169] The court held that it must consider whether the activity out of which the injury occurred served some military purpose.[170]

Having decided that the facts of *Brown* did not demonstrate a relevant relationship between the service member's activity and his

161. *See* Brown v. United States, 739 F.2d 362, 367 (8th Cir. 1984).

162. *See id.* at 362.

163. *See id.* at 367.

164. *See id.*

165. *See id.* When the incident occurred, the victim was off-duty for Memorial Day weekend with no training activities planned, and the victim was free to leave the base if he pleased. *See id.* Therefore, the court reasoned that even though the victim was not officially on furlough, the facts were not strong enough to apply *Feres* to this specific rationale. *See id.*

166. *See Brown*, 739 F.2d at 367.

167. *See id.* "The location of the injury has been considered significantly by many courts under the incident to service test. Indeed, one court has observed that it appears 'fairly well established' that if the injury occurs on a military base, recovery is automatically barred under *Feres*." *Id.*

168. *See id.* at 368.

169. *See id.*

170. *See id.* The court understood that the racially motivated hanging served no conceivable military purpose or mission. *See id.*

military service, the court then focused on the second part of the analysis: effects of military discipline.[171] The court placed the claims brought against the military into three categories and analyzed whether litigation would call into question the military's decision-making.[172] Because the litigation against the superior officers would call into question their specific disciplinary decisions, the court held that the *Feres* Doctrine barred the claims against the superior officers.[173]

3. *The Ninth Circuit: Costo v. United States*

In determining whether a specific case falls within the Supreme Court's interpretation of *Feres*, the Court of Appeals for the Ninth Circuit adopted a four-factor test.[174] On July 1, 1995, during a rafting trip sponsored by the United States Navy, Navy sailors Nollie Costo and Christopher Graham drowned after getting trapped when their raft tipped over in turbulent water.[175] The sailors' estates brought a claim against the Navy for negligence, alleging that the military breached its duty of care to the decedents.[176] The court recognized that previous courts avoided prescribing a standard for applying any particular rationales to the *Feres* Doctrine, but the court decided to adopt a four-factor test.[177] The four factors the court established in *Costo* were:

> 1) the place where the negligent act occurred; 2) the duty status of the plaintiff when the negligent act occurred; 3) the benefits accruing to the plaintiff because of his status as a service member; and 4) the nature of the plaintiff's activities at the time the negligent act occurred.[178]

171. *See id.* at 368.

172. *See id.* at 369. The three categories were: (1) failure to prevent the incident; (2) participation of certain defendants in the actual hanging incident; and (3) failure to perform a proper investigation into the incident. *See id.*

173. *See id.* The claims against the specific perpetrators, however, were permitted to continue. *See id.*

174. *See* JAYSON & LONGSTRETH, *supra* note 19.

175. *See* Costo v. United States, 248 F.3d 863, 865 (9th Cir. 2001).

176. *See id.* (noting that the estates alleged the duty was breached due to the military's failure to obtain a rafting permit, hire a trained guide, and properly supervise those guides). The estate further alleged that the military failed to properly scout the river, warn the rafters of the river's condition, properly equip the rafts, instruct the rafters, rescue the rafters, and administer lifesaving aid. *See id.*

177. *See id.* at 867.

178. *Id.*

In creating the four-factor analysis, the Ninth Circuit stressed that no one factor is dispositive.[179] Although the court ultimately held that the *Feres* Doctrine must be applied to the case, it did so reluctantly, admitting a frustration shared with other courts that have reached similar determinations.[180] Although a frustrating concept for courts, the *Feres* Doctrine has been applied to bar claims stemming from sexual assault against the United States military on numerous occasions.[181]

C. Sexual Assault and "Incident to Service": *Doe v. Hagenbeck*

Survivors of military sexual assault are not exempt from the incident to service standard of the *Feres* Doctrine.[182] As the prospect of receiving justice through the military justice system decreases, survivors seek remedies against their assailants in civilian courts.[183] However, *Feres* acts as an obstacle that is very difficult to overcome.[184]

In *Doe v. Hagenbeck*, Doe brought a claim against her superior officers, Lieutenant General Hagenbeck and Brigadier General Rapp, for a culture that persisted under their control that resulted in her assault.[185] Doe sought to hold these officers personally liable for damages in connection with their decisions regarding the training and

179. *See id.* ("[N]one of these factors [are] dispositive. Rather than seizing on any particular combination of factors, we have focused on 'the totality of the circumstances.'").

180. *See id.* at 869. ("[W]e apply the *Feres* doctrine here without relish. Nor are we the first to reluctantly reach such a conclusion under the doctrine. Rather, in determining this suit to be barred, we join the many panels of this Court that have criticized the inequitable extension of this doctrine to a range of situations that seem far removed from the doctrine's original purposes."). *Id.*

181. *See* Cioca v. Rumsfeld, 720 F.3d 505, 506, 518 (4th Cir. 2013) (holding that *Feres* counsels "judicial abstention"); *see also* Klay v. Panetta, 758 F.3d 369, 374 (D.C. Cir. 2014) (holding that *Feres* bars plaintiff's *Bivens* claim because the injury arose incident to service).

182. *See Rumsfeld*, 720 F.3d at 507 (holding that the survivor's negligence claims against the military for fostering a culture that perpetuated sexual harassment that led to acts of sexual assault were barred by the *Feres* Doctrine).

183. *See* Woods, *supra* note 21, at 1331 (explaining that the survivors seek to hold the government accountable through the criminal and civil system).

184. *See id.*

185. *See* Doe v. Hagenbeck, 870 F.3d 36, 41 (2d Cir. 2017) (explaining that Doe's equal protection claim is based on the notion that Lieutenant General Hagenbeck and Brigadier General Rapp "knowingly and intentionally created and enforced a policy and practice . . . that discriminated against female cadets [at West Point]" (internal quotations omitted)). Doe claims that her superior officers tolerated attacks against female cadets, discouraged reporting, and promoted a sexually aggressive culture that caused her own sexual assault. *See id.*

supervision of personnel at West Point.[186] However, the court found that her claim could not proceed.[187]

The majority opinion relied on *Chappell v. Wallace* and *United States v. Stanley*, *Feres* progenies, to justify dismissing Doe's *Bivens* claims.[188] The court noted that in *Chappell*,[189] the Supreme Court held that special factors advised against the service member plaintiffs from maintaining *Bivens* claims.[190] Further, the court noted that the *Chappell* Court cautions against allowing Doe's claims because, in the absence of congressional action, service members could not maintain a suit to recover damages for alleged constitutional violations.[191] Emphasizing the barring of Doe's *Bivens* claims, the court cited *Stanley*[192] in explaining that there is no *Bivens* remedy available for injuries that arise incident to service, despite there being no officer–subordinate relationship.[193] Thus, relying on Supreme Court precedent, the court found that since Doe was a member of the military at the time of her injury and the claims against her superior officers concerned military discipline and control, the civilian court would be required to second-guess military decisions, triggering the incident-to-service rule of *Feres*.[194]

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186. *See id.* at 42. Doe's points of contention against her superior officers regarded their "training, supervision, discipline, education, and command of service personnel at West Point." *Id.*

187. *See id.* In denying Doe's *Bivens* claim, the court held that enlisted military service members cannot "maintain a suit to recover damages from a superior officer for alleged constitutional violations." *Id.* (quoting Chappell v. Wallace, 462 U.S. 296, 296 (9th Cir. 1983)).

188. *See id.* at 42-50.

189. *See id.* at 43 (detailing the service members' claims against their superior officers for discriminating against them on the basis of race in Chappell v. Wallace, 462 U.S. 296 (1983)).

190. *See id.* (referencing *Chappell*, 462 U.S. at 297, 304, and the centuries of military expertise that makes civilian courts ill-equipped to interfere in military decision making).

191. *See id.* at 44. "Congress, the Court unanimously said, has 'plenary control over rights, duties, and responsibilities in the framework of the [m]ilitary [e]stablishment, including regulations, procedures[,] and remedies related to military discipline.'" *Id.* at 43-44 (quoting *Chappell*, 462 U.S. at 301).

192. *See id.* at 44. The court explained that the Supreme Court ruled that the former service member could not maintain a *Bivens* claim alleging that the Army secretly gave him doses of LSD to study the drug's effect even though some of the defendants were not Stanley's superior officers. *See id.*

193. *See id.* (referencing the holding in United States v. Stanley, 483 U.S. 669, 684 (1987)).

194. *See id.* The court relied on the Supreme Court's caution against extending *Bivens* to situations that have "special factors counselling hesitation." *Id.* at 42 (quoting *Chappell*, 462 U.S. at 298).

Doe argued that her injuries did not arise incident to her military service, using the court's decision in *Taber v. Maine*[195] to strengthen her argument, but the court disagreed.[196] Reflecting on its decision in *Taber*, the court stated that the question of whether the *Feres* doctrine barred the plaintiff's FTCA claim turned on whether a person in Taber's position would be entitled to compensation benefits under the scope-of-employment theory.[197] The court further explained that the *Taber* court held that the incident-to-service rule is still properly invoked when the claim requires military leadership to stand trial for its decision-making.[198]

The dissent, however, disagreed with the majority's application of *Taber* and the overall application of *Feres* to this case.[199] The dissent argued in its analysis that the harassment Doe endured was the result of the policies and practices the defendants implemented, encouraged, or allowed to proliferate.[200] The opinion went on to state that the *Feres* Doctrine should not apply to this case because Doe's injuries were not incident to her service.[201] Ultimately, Doe's claims against the defendants failed when the court once again deferred to Congress to remedy the issue the Supreme Court created.[202] Because of the

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195. *See id.* at 47. Enlisted Seabee Scott A. Taber was injured in a car accident by the drunken Navy serviceman Robert S. Maine. *See* Taber v. Maine, 67 F.3d 1029, 1032 (2d Cir. 1995). Taber sued Maine for negligent driving and the United States Government under the theory of *respondeat superior* because it was alleged that the accident occurred while Maine was acting within the scope of his Naval employment. *See id.*

196. *See Hagenbeck*, 870 F.3d at 47 (explaining that Doe's interpretation of *Taber* is misguided).

197. *See id.* (clarifying that the *Taber* court concluded that the theory turns on whether Taber was injured while he was engaged in activities that "fell within the scope of his military employment").

198. *See id.* at 48 (explaining that the *Taber* court understood that the *Feres* rule is invoked when a service member's claim requires commanding officers to be prepared to convince a civilian court of the infinite wisdom of military discipline decisions). The court went on to cast upon Congress the duty of determining whether affording money damages to claims such as Doe's is appropriate. *See id.* at 49.

199. *See id.* at 51 (Chin, J., dissenting).

200. *See id.* The dissent provides examples of the misogynistic West Point culture which included: creating separate curriculum requirements for male and female cadets with self-defense classes for women and boxing classes offered to men; requiring sexually transmitted disease testing for female cadets only; warning female cadets that it was their responsibility to dissuade sexual advances from male cadets while speaking openly about the male cadets' sexual exploits and encouraging them to take advantage of any sexual opportunity; imposing inadequate punishments for sexual offenders; and permitting sexually degrading, violent, and explicit group chants. *See id.*

201. *See id.* at 51.

202. *See id.* at 50 (concluding that while not discounting the seriousness of the allegations, it is the Legislature's duty to remedy this issue).

Supreme Court's refusal to provide an applicable test for defining "incident to service," the protectors in uniform are left without a civil recourse for the crimes committed against them; for this reason, the *Feres* Doctrine must be modified.

III. THE MODIFICATION OF *FERES*

Although the *Feres* Doctrine has a practical use in protecting the United States government from litigation for issues stemming from combat or training injuries, which is a clear purpose in the language of the FTCA, the way that the courts interpret the FTCA completely changes the way it is used in practice.[203] Survivors of sexual assault are forced to work within a complicated and problematic system that does not benefit them.[204] Within the military reporting system, there are fears that impartiality hinders the ways in which commanding officers do their jobs.[205] However, when survivors seek to recover from the administrative powers that failed to prevent rape or sexual assault in civil courts, they are barred from bringing suit because of the *Feres* Doctrine.[206] *Feres* is failing the service members who are harmed by acts that do not arise from service activities.[207] For this reason, the current application of the doctrine must be reexamined and modified.[208] Additionally, because *Feres* is a judge-made rule, it is the

203. *See generally* Committee Hearing, *supra* note 26 (using the statement of Daniel Joseph, counsel, Akin, Gump, Strauss, Hauer, and Feld, LLP, in which he argued that § 2680(j) of the FTCA bars liability for combatant activities during time of war, and the Court has not respected the balance of the interests Congress created).

204. *See generally* Mark Thompson, *Military Sexual Assault Victims Discharged after Filing Complaints*, TIME (May 18, 2016), htttp://www.time.com/4340321/sexual-assault-military-discharge-women/ [https://perma.cc/6CBK-YB5T] (detailing instances where survivors have been disciplined for filing reports of their sexual assaults).

205. *See generally* Jackie Speier, *Why Rapists in Military Get Away with It*, CNN (June 21, 2012), http://www.cnn.com/2012/06/21/opinion/speier-military-rape/index.html [https://perma.cc/8SLR-EYYQ].

206. *See* Cioca v. Rumsfeld, 720 F.3d 505, 517-18 (4th Cir. 2013) (holding that the survivors' claims were barred because their injuries occurred incident to service); *see generally* Klay v. Panetta, 758 F.3d 369 (D.C. Cir. 2014).

207. *See* Rebecca Huval, *Feres Doctrine and the Obstacles to Justice for Military Rape Victims*, PBS (May 9, 2013), www.pbs.org/independentlens/blog/feres-doctrine-and-the-obstacles-to-justice-for-military-rape-victims/ [https://perma.cc/2ZVV-XE8D] (explaining that the *Feres* Doctrine has been expanded to prevent victims of rape from suing the military).

208. *See id.* "Over half a century later, Feres is not only a judicial invention, but, more alarmingly, the seed of an ever-increasing body of flawed doctrinal offspring." *Id.*

job of the judiciary to rectify its misapplication.[209] Thus, a clearer test that eliminates much of the ambiguity surrounding "incident to service" would give survivors of military sexual assault a fighting chance to seek and receive the justice they deserve.[210]

A. A New Hope: *Feres* Reimagined

For survivors of military sexual assault to receive the justice they deserve, the current *Feres* framework must be reimagined.[211] Courts must look at the totality of the circumstances surrounding the assault instead of looking at the incident within the vacuum of military deference.[212] The United States Court of Appeals for the Fifth and Eighth Circuits contributed individual factors that would make the *Feres* Doctrine focus more on the actual incident, such as the duty status of the service member[213] and the actual activity of the service member when the injury occurred.[214] Furthermore, in evaluating the actual activity of the service member, courts must analyze whether the activity served a military goal or purpose and whether the injury sustained was a foreseeable consequence of that military goal or purpose.[215] In examining the foreseeability of military injuries, the *Taber* court analyzed the "incident to service" requirement through the workers' compensation scope, creating a digestible analysis for defining the term.[216] In a multistep analysis, courts should therefore

209. *See* Coreen Farris, Terry L. Schell, & Terri Tenielian, *Enemy Within: Military Sexual Assault Inflicts Physical, Psychological, Financial Pain*, RAND CORP., https://www.rand.org/pubs/periodicals/rand-review/issues/2013/summer/enemy-within.html [https://perma.cc/REB3-FBX6] (last visited Nov. 26, 2018) (explaining that under the current reporting system, survivors under report because of fear of retaliation, stigma, and lack of action).

210. *See* Feres v. United States, 340 U.S. 135, 146 (1950). *But cf.* THE INVISIBLE WAR, *supra* note 34 (explaining that under the current test, the Courts are outweighing the need for survivors receiving justice against the argument for military discipline and autonomy).

211. *See Cioca*, 720 F.3d at 514; *see also* Doe v. Hagenbeck, 870 F.3d 36, 44-47 (2d Cir. 2017) (citing *Feres'* incident to service analysis to bar claims of sexual assault brought against military leadership).

212. *See generally* Committee Hearing, *supra* note 26 (explaining how lawmakers and military leadership, past and present, are preoccupied with leaving decision-making to the military and ignoring the text of the legislation).

213. *See* Adams v. United States, 728 F.2d 736, 739 (5th Cir. 1984) (implementing the *Parker* test to determine the importance of duty status in a *Feres* analysis).

214. *See* Brown v. United States, 739 F.2d 362, 368 (8th Cir. 1984) (analyzing what the service member was actually doing when the injury occurred).

215. *See generally* Taber v. Maine, 67 F.3d 1029 (2d Cir. 1995).

216. *See generally id.* (comparing "incident to service" to employment rationale for workers' compensation payments).

look at the duty status of the service member and the actual activity of the service member at the time of the injury to determine whether an incident, particularly sexual assault, falls under a *Feres* Doctrine incident-to-service analysis.[217]

1. *Duty Status of the Service Member*

In determining whether a *Feres* Doctrine analysis should be applied to a particular incident, examining the duty status of the service member should be the first step.[218] Previous courts have determined that if a service member is completely discharged from the military, he or she is no longer under the purview of the *Feres* Doctrine analysis.[219] But if he or she is an active military service member, the *Feres* Doctrine analysis must be evaluated further.[220] In reality, however, duty status falls on a spectrum that is not always clearly delineated.[221] Thus, similar to the court's holding in *Parker*,[222] which emphasized the duty status spectrum, the analysis should also be considered on a spectrum with duty statuses closer to the "active military" end more likely to fall under a *Feres* Doctrine analysis.[223] When a service member is closer to active duty on the spectrum, the

217. *See Adams*, 728 F.2d at 739. "[D]uty status of the service member is usually considered the most indicative of the nature of the nexus between him and the government at the time of injury and is therefore the most important factor." *Id.*; *see also* Cioca v. Rumsfeld, 720 F.3d 505, 514 (4th Cir. 2013). "Plaintiffs argue, however, that the injuries they allege did not 'arise out of' and were not 'incident to' military service. Specifically, they assert that 'Defendants have not made any evidentiary showing that rape and sexual assault, and the resultant failures to punish the perpetrators, served a military mission.'" *Id.*

218. Parker v. United States, 611 F.2d 1007, 1013 (5th Cir. 1980) (analyzing the importance of the service member's duty status on a *Feres* and FTCA analysis).

219. *See Adams*, 728 F.2d at 739 (explaining that since the service member was essentially discharged from the Army, his duty status would disqualify him from a *Feres* analysis).

220. *See id.* (reaffirming that duty status is the most indicative of a relationship between the military and a service member and should, therefore, be subject to *Feres*).

221. *See* 10 U.S.C. § 101(d) (1956) (defining various military duty statuses).

222. *See generally Parker*, 611 F.2d 1007 (holding that if a service member is discharged from the military, his activities are not likely to be "incident to service," but a service member who is on active duty is most likely acting incident to his or her service). Specialist Five Jack Lowe Parker was killed in a car accident on an Army maintained road within Fort Hood. *See id.* at 1008. His car collided with a service member named Peters who at the time of the fatal accident was driving a military vehicle. *See id.* The United States Court of Appeals for the Fifth Circuit held that the district court erred in granting the government summary judgment due in part to his attenuated duty status at the time of the accident. *See id.* at 1015.

223. *See, e.g.*, *id.* at 1014 (analyzing the victim's four-day absence from base and deciding that the absence was to an extent that allowed the claim to proceed).

service member is under military control and supervision—highlighting the importance of duty status.[224] It logically follows that, since the service member is under the scrutiny of the military, it is more likely that *Feres* precludes the claim.[225]

While courts have previously designated this factor as dispositive of the *Feres* Doctrine's application, it should act merely as a gatekeeper to *Feres* cases.[226] It makes little sense to decide whether a claim should continue or be barred primarily on the duty status of a service member because the distinction undercuts the right to sue the government as provided by the FTCA.[227] Instead, the most dispositive factor of this two-step analysis should be the actual activity of the service member at the time the incident occurred.[228] This analysis would require the court to look at the totality of the circumstances surrounding the incident.[229] In cases involving sexual assault or rape, it should be clear that those injuries fall outside the scope of the *Feres* Doctrine analysis because no matter how militaristic the initial activity, rape should never be recognized as a foreseeable consequence.[230]

2. *The Actual Activity of the Service Member at the Time of the Incident*

After deciding that a service member falls under a *Feres* analysis, the court must then review the actual activity of the service

224. *See* Downes v. United States, 249 F. Supp. 626, 628 (E.D.N.C. 1965) (emphasizing that "[t]he peculiar and special relationship of the soldier to his superiors" requires the courts to pause and carefully examine whether proceeding under a *Feres* Doctrine analysis is warranted).

225. *See Parker*, 611 F.2d at 1013. "Nevertheless in this case, a suit by one leaving the base to attend to his personal affairs, while under no military supervision, will not interfere with military discipline." *Id.*

226. *See generally* Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181 (1962). "[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." *Id.* at 188.

227. *See* Doe v. Hagenbeck, 870 F.3d 36, 56 (2d Cir. 2017) (Chin, J., dissenting) (describing multiple cases in which service members have successfully sued the U.S. government for violating constitutional rights).

228. *See id.* at 59 (explaining that Doe's activity was so far removed from her military service that it should not warrant a *Feres* analysis).

229. *See id.* The dissent looked at what Doe was doing at the time of the injury in its opinion and not just her status as a cadet or the location of the alleged rape. *See id.*

230. *See generally* Zerlina Maxwell, *Rape Culture Is Real*, TIME (Mar. 27, 2014), http://time.com/40110/rape-culture-is-real/ [https://perma.cc/BB9E-3BF5] (defining what rape culture is and how slut-shaming affects society).

member when the injury occurred.[231] In previous *Feres* cases, courts have seemingly glossed over the actual incident that resulted in the injury to decide whether it fits within the *Feres* Doctrine analysis.[232] Instead, courts have opted for determining the basis for *Feres* Doctrine application on the service member's duty status and on whether their judicial interference would disrupt military cohesion and discipline.[233] But, in determining whether an injury is incident to the service member's service, the court must analyze and discuss the facts and circumstances surrounding the injury.[234] The *Feres* Court used the word "incident" in its decision regarding the relationship of the injury and the service activity because it logically follows that the injury flows from the service, which serves a military purpose or goal.[235] Therefore, in determining this second step, courts must look at whether the activity served a military purpose or goal and whether the injury was a foreseeable consequence of that military purpose or goal.

a. Serving a Military Purpose or Goal

Examining the actual language of the FTCA from which the *Feres* Doctrine is derived, the Act explicitly excludes injuries that are the result of "combatant activities."[236] Combatant activities are most likely to be those in which the service member is asked to use force against an adversary.[237] These adversaries are most often not enemies

231. *See generally* 28 U.S.C. § 2680(j) (1948). Since the Act specifically mentions "combatant activities . . . during time of war," the actual activity of the service member at the time of the injury is a material element Congress created to determine whether liability is barred. *Id.*; *see also* Brown v. United States, 739 F.2d 362, 367 (8th Cir. 1984) (explaining that the nature of the activity from which the injury resulted must be examined to determine whether a relevant relationship existed between the service member's activity and his or her military service).

232. *See* United States v. Shearer, 473 U.S. 52, 57 (1985) (deciding that the injuries to the victim were not as important as whether the decision to allow the claim to proceed would interfere with military decision-making).

233. *See id.*

234. *See* Pringle v. United States, 44 F. Supp. 2d 1168, 1173 (Kan. D. Ct. 1999) (explaining that when a court examines a *Feres* question, they must do so by reviewing the totality of the facts and circumstances surrounding the injury).

235. *See Incident*, OXFORD DICTIONARIES, https://en.oxforddictionaries.com/definition/incident [https://perma.cc/H76B-3D3M] (last visited Nov. 26, 2018) (defining "incident" to mean "[l]iable to happen because of; resulting from").

236. 28 U.S.C. § 2680(j). The provisions of the FTCA shall not apply to "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." *Id.*

237. *See* Johnson v. United States, 170 F.2d 767, 770 (9th Cir. 1948) (defining "combatant" to mean activities, not limited to violence, both necessary to and in direct connection with actual hostilities).

within the United States military itself,[238] and these activities serve the military purpose and goal of national security.[239] Therefore, injuries that are the result of wartime fighting, combat training, or those that are caused by an enemy adversary are clear examples of the type of injury Congress sought to bar from litigation.[240] Essentially, if the activity can be traced back to a military goal or purpose, only then should the *Feres* Doctrine control.[241]

Proponents of using the existing *Feres* Doctrine for cases of sexual assault claim that the *Feres* Doctrine restricts military second-guessing, which in turn serves the military goal of autonomous decision making.[242] This ideology can be seen within military leadership, as well as within the courts themselves.[243] The notable shift from the original rationale in *Feres* to the current deference to military decision-making makes it clear that there is a fear of civilian courts interfering in the way the military decides to conduct itself.[244] Courts have stated on numerous occasions within *Feres* decisions that the courts do not want military leadership second-guessing itself during missions and training exercises out of fear of being hauled into a civilian court to provide and explanation for its actions or decisions.[245]

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238. *See id.*; *see also* § 2680(k) (detailing the Act's exception to injuries that occurred abroad, further strengthening the argument that combatant activities are those that happen against a foreign enemy as opposed to enemies within one's own army).

239. *See Who We Are*, U.S. ARMY, https://www.army.mil/info/organization/ [https://perma.cc/2H26-HUSD] (last visited Nov. 26, 2018). "The U.S. Army's mission is to fight and win our Nation's wars by providing prompt, sustained land dominance across the full range of military operations and spectrum of conflict in support of combatant commanders." *Id.*

240. *See* Doe v. Hagenbeck, 870 F.3d 36, 59 (2d Cir. 2017) (Chin, J., dissenting) (arguing that claims that "call into question 'the military judgments and decisions that are inextricably intertwined with the conduct of the military mission'" are claims that ought to be barred (quoting U.S. v. Johnson, 481 U.S. 681, 691 (1987))).

241. *See* Kelly v. Panama Canal Comm'n, 26 F.3d 597, 600 (5th Cir. 1999) (stating that activities that serve a military function would fall under *Feres* scrutiny).

242. *See* Cioca v. Rumsfeld, 720 F.3d 505, 514 (4th Cir. 2013) (explaining that while the sexual assault allegations are disturbing, allowing the claims to continue would challenge military decision-making).

243. *See generally* United States v. Shearer, 473 U.S. 52 (1985); Doe v. Hagenbeck, 870 F.3d 36 (2d Cir. 2017) (citing military decision-making and the importance of maintaining good order in their reliance on the *Feres* Doctrine); Brown v. United States, 739 F.2d 362 (8th Cir. 1984).

244. *See Shearer*, 473 U.S. at 58 (condemning the possibility of a civilian court ignorantly overlooking military decisions and commands).

245. *See* Committee Hearing, *supra* note 26, at 8 (commenting on the possibility of diminished military effectiveness due to civilian court interference in the statement of Paul Harris, Deputy Associate Attorney General, Department of Justice).

Further, many politicians and military leaders have gone on record to disparage the idea that civilian courts have any possible insight into how the military should conduct itself.[246]

However, while military discipline and cohesion are obviously important aspects to the overarching goal of national security, shutting the courthouse doors to military personnel who have suffered at the hands of military rapists and sexual assaulters diminishes military discipline and cohesion.[247] Additionally, the cost to unit cohesion, order, and discipline is dramatically diminished when a sexual assault survivor is not able to recover through the court system.[248] When a service member is sexually assaulted by one of the military's own, loyalty and trust are immediately destroyed.[249] When nothing is done about the assault or if judicial recourse is not available, unit cohesion, discipline, and order are negatively affected, which could be the difference between life and death in a war zone.[250] Essentially, in attempting to protect military effectiveness by limiting civil recourse for sexual assault, the military and the courts are actually hindering it.[251]

Moreover, sexual assault has its roots in rape culture that draws its strength from power struggles between victim and perpetrator.[252] When a person sexually violates another—male or female—that person is asserting power and dominance over the victim.[253] This toxic power struggle is not, and should not be, a recognized goal of the military.[254] Because the activities of sexual assault and rape do not

246. *See id.*; *see also id.* at 4 (explaining that maintaining good order was a main reason he supports *Feres* in the statement Rear Admiral Christopher E. Weaver, Rear Admiral and Commandant, Naval District Washington, D.C.).

247. *See* Farris, Schell, & Tanielian, *supra* note 209 (explaining the effects of military sexual assault on a survivor).

248. *See generally* LINDSAY ROSENTHAL & LAWRENCE KORB, TWICE BETRAYED: BRINGING JUSTICE TO THE U.S. MILITARY'S SEXUAL ASSAULT PROBLEM, CENTER FOR AMERICAN PROGRESS (Nov. 2013) (arguing the substantial costs to the military when sexual assault is ignored or not taken seriously).

249. *See* Farris, Schell, & Tanielian, *supra* note 209 (denoting the effects of military sexual assault on military effectiveness).

250. *See id.*

251. *See generally* Rachel Natelson, *The Unfairness of the* Feres *Doctrine*, TIME (Feb. 25, 2013), http://nation.time.com/2013/02/25/the-unfairness-of-the-feres-doctrine/#ixzz2SkR0sdEb [https://perma.cc/U2GF-R2JQ] (detailing how the *Feres* Doctrine has affected Ariana Klay's, the plaintiff in *Klay v. Panetta*, pursuit of justice).

252. *See* Gabrielle Lucero, *Military Sexual Assault: Reporting and Rape Culture*, 6 SANFORD J. PUB. POL'Y 1, 4-5 (2015) (defining rape culture).

253. *See id.* at 5 (explaining "that sexual violence is not about sexual gratification, but about power and control").

254. *See id.*

serve a military purpose or goal, the analysis must then cease and allow for service members to bring claims against the military.[255] Even if courts determine that sexual assault and rape are not activities but are instead injuries, the new *Feres* Doctrine analysis would still fail in cases involving sexual assault and rape.[256]After determining whether a military goal or purpose is present in a particular case, courts must then determine whether the specific injury was a foreseeable consequence of that goal or purpose.

b. The Injury Was a Foreseeable Consequence of the Military Goal or Purpose

After determining that the activity was one that serves a military goal or purpose, courts should then determine whether the injury was a foreseeable consequence of that military goal or purpose.[257] The United States Court of Appeals for the Second Circuit applied the *respondeat superior* doctrine as it relates to workers' compensation in order to better analyze the foreseeability of injuries that are incident to service.[258] The court concluded that since the *Feres* Doctrine bars claims for injuries that arise out of activities incident to service and because "arising out of or in the course of employment" is a defined meaning for workers' compensation claims, the test for both should be interpreted in similar ways.[259] The *Taber* test asks whether the service member engaged in activities that fell within the scope of his or her military employment.[260] If the answer is yes—the service member did engage in activities that fell within the scope—then the *Feres* Doctrine

255. *See* ROSENTHAL & KORB, *supra* note 248, at 10. "Our profession is built on a bedrock of trust—the trust must inherently exist among soldiers, and between soldiers and their leaders to accomplish their mission in
the chaos of war. Recent incidents of sexual assault and sexual harassment demonstrate that we have violated that trust." *Id.* (quoting General Ray Odierno testifying before the Senate Armed Services Committee).

256. *See* Rochelle Rubin Weber, *"Scope of Employment" Redefined: Holding Employers Vicariously Liable for Sexual Assaults Committed by Their Employees*, 76 MINN. L. REV. 1513, 1514 n.5 (1992) (citing cases that have determined that sexual assault is outside the scope of employment).

257. *See* Taber v. Maine, 67 F.3d 1029, 1050 (2d Cir. 1995) (connecting the foreseeability logic of workers' compensation payments to military injuries under *Feres*).

258. *See id.* at 1049.

259. *Id.* at 1049-50.

260. *See id.* at 1050. "[W]e conclude that in assessing whether a military plaintiff's FTCA claim is barred, the court should proceed by considering the same question that would determine whether the plaintiff would be entitled to receive standard workers' compensation payments for his injury . . . ." *Id.*

applies and bars the claim.[261] If the answer is no, then the *Feres* Doctrine does not apply, and the claim should be allowed to proceed.[262] For incidents where the injury is sexual assault or rape, courts have decided that the activity falls outside the scope of one's employment, a trigger for worker's compensation feasibility.[263] Thus, the proper application of this test will impose a *per se* bar on *Feres* Doctrine application to sexual assault and rape claims—the standard previously used.[264]

Critics of proposed *Feres* Doctrine changes believe that Congress should be responsible for solving the problems the Doctrine and the applications it has created.[265] In the original *Feres* decision, the Court placed the responsibility of clarifying the Doctrine on Congress's shoulders as the author of the FTCA.[266] This idea has continued to manifest itself in pro-*Feres* decisions as a defense to the growing criticism.[267] However, passing legislation through Congress is a laborious and arduous process with very little change made in a

261. *See id.* In answering yes, the court compares the scenario to the workers' compensation entitlements. *See id.* If the service member would be entitled to recover workers' compensation payments, the *Feres* Doctrine would bar them from bringing a claim. *See id.*

262. *See id.* The court conversely stated that a service member's claim should be allowed to proceed if they would not be able to recover worker's compensation payments for their injuries. *See id.*

263. *See* Jim Pocius, *Workers Compensation and Course of Employment*, INT'L RISK MGMT. INST. INC. (Feb. 2001), https://www.irmi.com/articles/expert-commentary/workers-compensation-and-course-of-employment [https://perma.cc/C75G-U7W8] (explaining that all workers' compensation laws require that the employee be within the course of employment in order to receive benefits); *see also* Weber, *supra* note 256, at 1520-22 nn.33-34 (explaining that many jurisdictions focus on the employee's personal motivation to commit sexual assault and the unexpected nature of the activity in determining that the employer cannot be held liable).

264. *See Taber*, 67 F.3d at 1050. If sexual assault falls outside the scope of employment, then *Feres* will not bar those claims. *See id.*

265. *See* Committee Hearing, *supra* note 26, at 4 (referencing the statement of Rear Admiral Christopher E. Weaver, Rear Admiral and Commandant, Naval District Washington, Washington, D.C.); *see also* Feres v. United States, 340 U.S. 135, 139 (1950) (placing the responsibility of changing *Feres* on Congress). "[T]he *Feres* Doctrine is important to maintaining good order and discipline in the military . . . [l]litigation is inherently divisive and disruptive." Committee Hearing, *supra* note 26, at 4 (referencing the statement of Rear Admiral Christopher E. Weaver, Rear Admiral and Commandant, Naval District Washington, Washington, D.C.).

266. *See Feres*, 340 U.S. at 139. "These considerations . . . should persuade us to cast upon Congress, as author of the confusion, the task of qualifying and clarifying its language." *Id.*

267. *See Hagenbeck*, 870 F.3d at 50; *see also Shearer*, 473 U.S. at 57.

short period of time.[268] Thus, because Congress's language in the FTCA is unambiguous, and because the Supreme Court created the *Feres* controversy, it should be the Supreme Court's responsibility to rectify the error in interpretation.[269]

Moreover, Congress was quite clear in its intent concerning who can sue the military, when persons may sue, and for what persons can sue.[270] Looking again at the original intent of *Feres* and the FTCA, Congress wanted to maintain a semblance of autonomy for military decision-making.[271] For example, when a service member is on the front lines of battle—a highly dangerous and chaotic area where anything can go wrong—a gunshot wound or injury from an explosion is a completely foreseeable injury.[272] This element must go hand in hand with the military goal or purpose, meaning that the foreseeable injury must be in the same nexus as that goal or purpose.[273] Turning to the specific injuries of sexual assault and rape, while a service member may be in a particular location or situation for the military goal of national security, sexual assault and rape can never be viewed as a risk the service member was foreseeably assuming.[274]

B. Justice for Doe and Beyond

Doe v. Hagenbeck is one of the latest circuit court cases on military sexual assault and the application of the *Feres* Doctrine,

268. *See* Committee Hearing, *supra* note 26, at 24 (referencing the statement of United States Senator Patrick J. Leahy, which explains that just because Congress has not passed new legislation on the matter does not mean it agrees with the courts' interpretation).

269. *See* United States v. Johnson, 481 U.S. 681, 703 (1987) (Scalia, J., dissenting) (explaining that although the case before them has not explicitly asked the Court to reverse *Feres*, the doctrine was wrongly decided, and it should not be extended).

270. *See* 28 U.S.C. §§ 2671-2680 (1948) (detailing the provision in the Act).

271. *See* § 2680 (providing multiple exceptions to the general rule that service members may sue the United States government).

272. *See For Military, Different Wars Mean Different Injuries*, NPR (June 8, 2011, 4:54 PM), https://www.npr.org/2011/06/12/137066281/for-military-different-wars-mean-different-injuries [https://perma.cc/F6TZ-YECF] (explaining that in today's modern warfare soldiers can be brutalized in a variety of different ways by encountering gunshots and explosives).

273. *See* Scott Glotzer, *Maheshwari v. City of New York*, 50 N.Y. L. SCH. L. REV. 833, 835 (2006). This nexus can be likened to the connection between foreseeability and proximate cause in tort law. *See id.* at 846.

274. *See* Lucero, *supra* note 252, at 4 (stating that rape culture causes misconceptions about how and why rape occurs, and who gets raped).

making the Doctrine ripe for review by the Supreme Court.[275] Thus, if the Court grants a petition for certiorari, the Court should use the proposed *Feres* Doctrine analysis to ensure justice and fairness for Doe and to set a precedent for future military sexual assault cases.[276] First, to determine whether to examine a Doe's claim under the *Feres* microscope, the Court must identify her duty status at the time of the injury.[277] At the time of her assault, Doe was a West Point cadet and an active duty member of the United States Army.[278] Thus, Doe's status as an active duty member of the military places her on the extreme end of the duty status spectrum and squarely within the gates of the *Feres* Doctrine analysis.[279]

Under this framework, the Court would next have to decide whether the activity that caused the injury served a military goal and whether the injury was a foreseeable consequence of that military goal.[280] Doe's injuries were the result of a rape perpetrated by one of her fellow cadets.[281] Looking specifically at the rape, it is obvious that it does not serve a military goal in any way.[282] If the Court decided to look more broadly, it would see that Doe's walk around campus at 1:00 a.m. immediately preceding the incident cannot not be seen as serving a military goal because it took place after hours and in violation of the school's curfew rules.[283] Thus, Doe's injuries were not the result of an activity that served a military goal or purpose, thereby

275. *See generally* Doe v. Hagenbeck, 870 F.3d 36 (4th Cir. 2017) (referencing the August 30, 2017 decision date).

276. *See supra* Subsection III.A.2.a-b. (detailing the proposed changes to the *Feres* Doctrine analysis).

277. *See supra* Subsection III.A.2.a. (explaining that the *Feres* Doctrine analysis must begin with the duty status to determine whether the analysis must continue).

278. *See Hagenbeck*, 870 F.3d at 39 ("As a West Point cadet, Doe was a member of the Army."); *see also* 10 U.S.C. § 3075 (1956) (explaining that cadets of the U.S. Military Academy are a part of the Regular Army and, thus, are on active duty).

279. *See* Warren, *supra* note 226 and accompanying text (explaining that the service member's duty status should not the sole reason a service member is not permitted to bring a suit against the military).

280. *See supra* Subsection III.A.2.b. (explaining that if the activity served a military purpose or goal, then the injury must be a foreseeable consequence of the military purpose or goal for the *Feres* Doctrine to bar the claim).

281. *See Hagenbeck*, 870 F.3d at 39 (describing the rape that took place after hours on May 9, 2010).

282. *See id.* at 59 (Chin, J., dissenting) (explaining that the relationship between Doe's rape and a military goal is too attenuated).

283. *See id.* at 39 (describing the activity as a violation of West Point rules).

ending the *Feres* analysis.[284] However, if the Court decided that one of the aforementioned activities served a military goal—most likely the walk around campus—then it must determine whether the injury was a foreseeable consequence.[285] Because Doe's injury would fall outside the scope of employment for workers' compensation benefits, she would not be able to receive payments if she was operating within that schema—essentially making her injury an unforeseeable consequence.[286] Because of this unforeseeable consequence, the *Feres* Doctrine would not bar Doe's claims against General Hagenbeck and General Brigadier Rapp.[287] Further, holding that sexual assault and rape are foreseeable consequences to taking walks on campuses would only further the pervasive sexual harassment and victim-blaming rape culture within the military.[288]

This potential holding would do more than allow Doe to recover from the administrative powers who allowed her sexual assault to occur.[289] In fact, the issue of sexual assault and holding enablers accountable reaches farther than the military sector.[290] The wave of accountability has crashed into industries like athletics, music, film, and academia.[291] The civilian courts provide recourse for civilian

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284. *See supra* notes 210-222 and accompanying text (explaining that the *Feres* analysis ends once the activity that led to the injury has been found to not serve a military purpose or goal).

285. *See supra* Subsection III.A.2.b. (explaining that the next step in the analysis, the *Taber* element, asks whether the injury would result in workers' compensation benefits in parallel circumstances).

286. *See* Taber v. Maine, 67 F.3d 1029, 1049-50 (2d Cir. 1995); *see also* Weber, *supra* note 256, at 1514 (explaining that courts have held that sexual assault is outside the scope of employment).

287. *See* Subsection III.A.2.b. (stating that if a service member's claim would fail under the workers' compensation doctrine of "arising out of or in the course of employment," then that claim is not barred by the *Feres* Doctrine).

288. *See Hagenbeck*, 870 F.3d at 52 (providing examples of the victim blaming culture within the military academy).

289. *See* BriGette McCoy, *The Military's Sexual Assault Response Is a Catastrophic Blight on Our Service*, GUARDIAN (May 2, 2014), https://www.theguardian.com/commentisfree/2014/may/02/us-military-sexual-assault-response [https://perma.cc/73PV-H37G] (explaining how changes to the current system, both inside and outside of military, would have positive results for survivors).

290. *See* Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/G38G-Y7M2] (detailing how the #MeToo movement started from Hollywood industry leaders speaking out about their sexual assaults at the hands of influential people like Harvey Weinstein).

291. *See id.* This movement shows that sexual assault is wide spread, and many people have their own #MeToo stories to tell in a variety of industries and sectors. *See id.*

litigants who seek to change the rape culture pervasive in American society.[292] By interpreting the *Feres* Doctrine in this way, Doe's case has the potential to afford military litigants the same chance at changing the system within which they work.[293]

CONCLUSION

It should be the job of the Court to rectify the misunderstanding and inconsistent meanings of the "incident to service" analysis for lower courts to follow.[294] Leaving the issue open without a guidepost to analyze specific cases unjustly harms the survivors of heinous acts like sexual assault and rape.[295] Sexual assault should not be seen as a risk that a service member has assumed when deciding to become a protector of the United States.[296] Therefore, the Court, upon the potential review of *Hagenbeck*, should ask whether the activity that resulted in Doe's injury served a military purpose or goal and whether the injury was a foreseeable consequence of that military purpose or goal to ensure justice for survivors of military sexual assault.[297]

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292. *See* Matt Mencarini, *18 More Alleged Victims Sue MSU, Nasser*, LANSING ST. J. (Jan. 10, 2017, 5:07 PM), https://www.lansingstatejournal.com/story/news/local/2017/01/10/larry-nassar-michigan-state-lawsuit/96246098/ [https://perma.cc/VT73-BJ3C]; *see also* Rose Minutaglio, *18 Female Athletes Sue USA Gymnastics and Michigan State over Alleged Sexual Abuse by 'Acclaimed' Team Doctor*, PEOPLE (Jan. 10, 2017, 9:35 PM), http://people.com/crime/18-women-sex-abuse-lawsuit-larry-nassar-usa-gymnastics/ [https://perma.cc/CPS2-AZZU] (describing lawsuits brought by Larry Nasser's sexual assault victims against USA Gymnastics and Michigan State University for failing to protect them from a doctor under the organizations' control).

293. *See generally* Sandra Park, *Separate and Unequal: Sexual Assault Survivors in the Military*, HUFFINGTON POST (Feb. 12, 2018, 10:55 AM), https://www.huffingtonpost.com/sandra-park/separate-and-unequal-sexu_b_2569808.html [https://perma.cc/HJ3J-YSXH] (explaining the strides that have been taken to protect service members from sexual assault, but more must be done).

294. *See supra* notes 241-243 and accompanying text (explaining the shift in rationale for *Feres* application).

295. *See supra* note 217 and accompanying text (emphasizing the importance of analyzing the activity of the service member and the duty status of the servicemember to determine *Feres* applicability).

296. *See supra* note 220 and accompanying text (detailing that active duty status is only the first step of the analysis).

297. *See supra* notes 236-274 and accompanying text (concluding that sexual assault cannot be viewed as a foreseeable consequence to joining the armed forces).